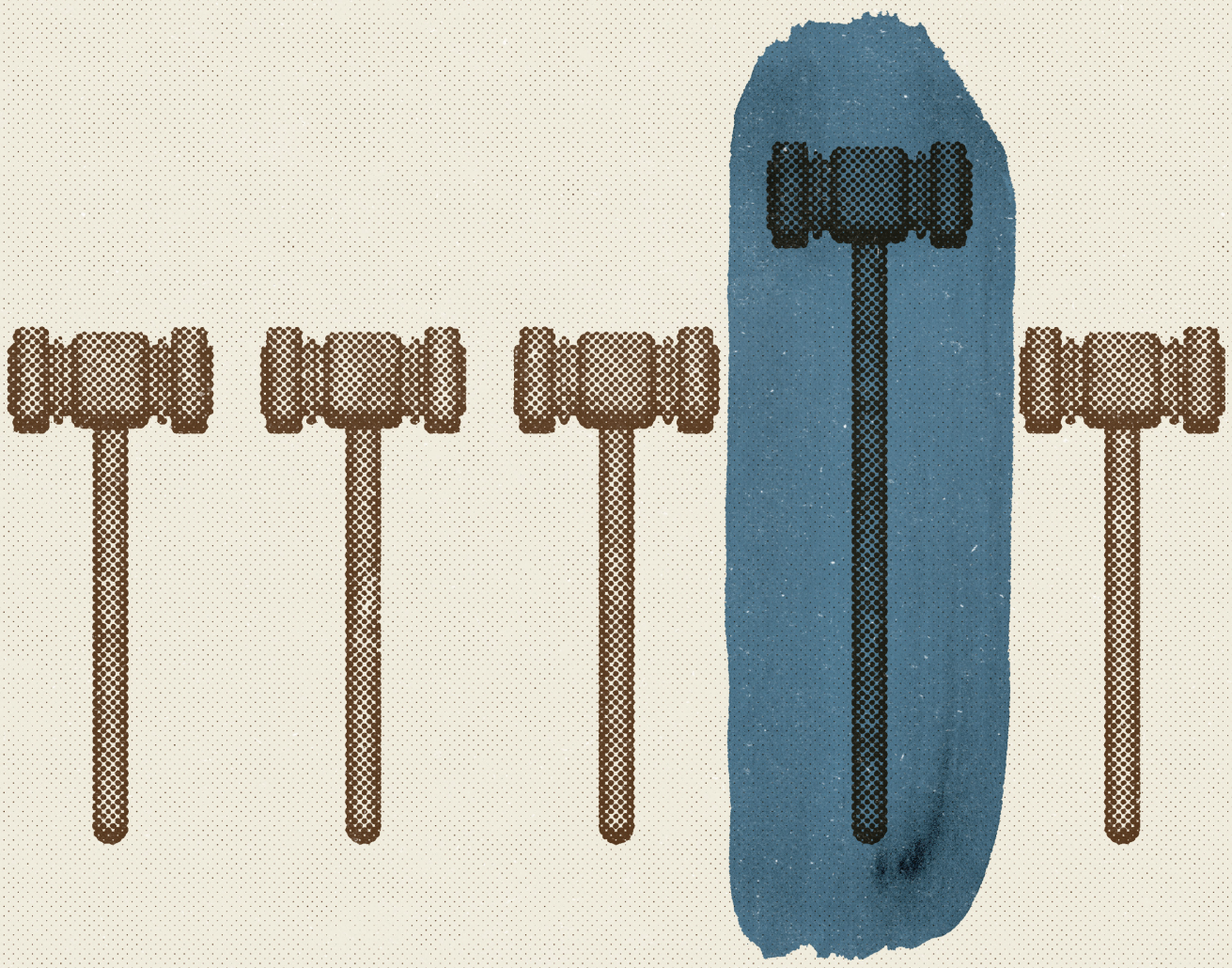

Gábor Mészáros

Exceptional Governmental Measures without Constitutional Restraints

1. Background

In December 2020, during the COVID-19 pandemic, while the population was preparing for a very special festive period burdened with restrictions, the Hungarian Parliament thought that this was the historic moment to adopt an amendment to the Fundamental Law (the ninth one, in fact) by qualified majority. The situation was peculiar also because the Fundamental Law's chapter on the special legal order to be amended was applied at that time due to the "state of danger" *(veszélyhelyzet)* ordered earlier,[1] so a complete rewriting of the chapter was only possible with a later entry into force date. Of course, it is still a mystery why, in the midst of a pandemic, and with a highly controversial, internationally disputed *carte blanche* mandate in hand, the two-thirds governing majority thought that this was the most appropriate time to amend the constitution. Of course, the amendment's subject is not surprising itself, as in recent years it has become a regular practice for the government to use "crisis" for political ends in some form. This is how the "state of migration emergency" *(tömeges bevándorlás okozta válsághelyzet)*[2] or the "state of medical crisis" *(egészségügyi válsághelyzet)*,[3] which uses the former legal regime as an analogy, introduced into the ordinary legal order. By the end of 2020, when the number of those infected with the coronavirus reached and in some cases exceeded 5,000 per day in the country,[4] the government, by making use of the special legal order (in particular, the state of danger[5]) and the extraordinary legal instruments incorporated into the ordinary legal order, and so by ensuring a kind of "hybrid" legal order, had laid the foundations of a permanent rule by decree, on the one hand.[6] On the other hand, by (ab)using its two-thirds majority, at the same time the supermajority had rewritten the rules of the special legal order. In this paper, I will focus on the latter, which is the legal (constitutional law) situation created by the Ninth Amendment to the Fundamental Law, but I will also strive to present during my analysis other relevant legislative issues related to the amendment.

In order to assess the constitutional law reasons for the new regulation (which entered into force earlier, on 1 November 2022, instead of the originally planned date, 1 July 2023, due to the Tenth Amendment to the Fundamental Law, adopted on 24 May 2022), it is essential to reflect on the public law situation prior to the amendment. As I mentioned in the introduction, the Ninth Amendment to

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[1] During this time, there was a state of danger in Hungary, in the framework of which – at least this is the constitutional theoretical background to the state of danger – the Government asked the Parliament to give the executive branch power to govern by decree, bypassing the classic parliamentary legislation, with a view to the extraordinary situation. This presupposes that the Parliament is constrained, at least in its normal course of business, and thus unable to properly discharge its constitutional duties because of the pandemic. It seems that the Parliament was still able to amend the Fundamental Law.

[2] Gábor Mészáros: Egy menekültcsomag veszélyei – Mit is jelent valójában a tömeges bevándorlás okozta válsághelyzet? [The Dangers of an Asylum Law Package – What Does the State of Crisis Caused by Mass Immigration Mean in Reality?], *Fundamentum*, 2015/2-3, 107-119.

[3] Gábor Halmai – Gábor Mészáros – Kim Lane Scheppele: From Emergency to Disaster – How Hungary' Second Pandemic Emergency will further Destroy the Rule of Law, *Verfassungsblog*, 30 May 2020; Gábor Mészáros: Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of COVID-19, *Review of Central and East European Law,* 2021/46, 69-90.

[4] Daily data in this regard can be retrieved on this website: https://www.worldometers.info/coronavirus/country/hungary/.

[5] On the concerns related to ordering and maintaining the state of danger, see: Zoltán Szente: A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái [The Constitutional Problems of the State of Danger Declared on 11 March 2020], *MTA Law Working* Papers, 2020/9; Gábor Mészáros: Indokolt-e különleges jogrend koronavírus idején – Avagy a 40/2020. (III. 11.) Korm. rendelettel összefüggő alkotmányjogi kérdésekről [Is Special Legal Order Justified in the Time of the Coronavirus – About the Constitutional Law Questions Related to Government Decree 40/2020. (III. 11.)], *Fundamentum*, 2019/3-4, 63-72.

[6] Gábor Mészáros: Never-Ending Exception, The Ukraine War Perpetuates Hungary's Government by Decree, *Verfassungsblog*, 10 May 2022.

the Fundamental Law was adopted by the Parliament at the end of December 2020, when the country was heavily affected by the pandemic. But what could be the reasons behind the fact that a government which considers the country a constitutional democracy, transforms the special legal order rules that are currently applying, as a priority in the midst of a global crisis? In my view, that could be explained by two things; of course, the two may be linked. On the one hand, it is important to underline that the application of emergency regimes – provided that the constitution contains such rules – are not, by definition, part of everyday governing (if it becomes that, it is also an important sign of an autocratic transition, as we have seen in the case of the German Weimar Republic as well). Therefore, especially when a special legal order regime is applied for the first time to deal with a real crisis, it is natural that shortcomings may arise which could not have been foreseen during the codification process (of course, it can and should be disputed whether a practical anomaly/dysfunction arising from a constitutional rule requires a constitutional amendment). On the other hand, it is also possible that this practical experience opens up new possibilities for an autocratisating regime, which seeks to assert its extraordinary powers through regulatory actions, based on "autocratic legalism".[7] As I will show below, I believe that both scenarios can be considered in the context of the Ninth Amendment to the Fundamental Law.

2. The Ninth Amendment to the Fundamental Law

2.1. Was it justified?

Since 2010, Hungary has been subject to a peculiar categorization. There have been many definitions of the regime, all driven by the concern that our country's commitment to liberal democracy and constitutionalism, the rule of law and human rights has changed (and is changing) in a negative direction. It is far beyond the scope of this paper to present all the theories (legal, political science, sociological, etc.), so I will just refer to a few important definitions. The terms "democratic decay",[8] "illiberal democracy",[9] "authoritarianisation"[10] or "democradura"[11] have been coined to describe democratic backsliding; while the terms "illiberal", "populist" or "autocratic" have been used to describe the regime itself. The latter, moreover, can take many other forms, such as modern, competitive or electoral autocracy.[12] In several instances, definitions such as illiberal constitutionalism, abusive neo-militant militant democracy or externally constrained hybrid regime have been developed to focus on the most important aspects of the functioning of the regime.[13] While I do not wish to add

[7] Kim Lane Scheppele: Autocratic Legalism, *The University of Chicago Law Review*, 2018/85-2, 545-584; Gábor Mészáros: Az autokratikus legalizmus vége [The End of Autocratic Legalism], *Fundamentum*, 2021/1, 55-61.
[8] Tom Gerald Daly: Democratic Decay: Conceptualising an Emerging Research Field, *Hague Journal on the Rule of Law*, 2019/11-1, 9-36.
[9] Tímea Drinóczi – Agnieszka Bien-Kacala: Illiberal Constitutionalism – The Case of Hungary and Poland, *German Law Journal*, 2019/21-2, 105-130.
[10] Anna Lührmann – Staffan I. Lindberg: A Third Wave of Autocratisation is Here: What is New About It?, *Democratisation*, 2019/26-7, 1095-1113.
[11] Gábor Halmai: Legally Sophisticated Authoritarians: The Hungarian Lex CEU, *Verfassungsblog*, 31 March 2017.
[12] Gábor Halmai: The Rise and Fall of Constitutionalism in Hungary. In: *Constitutional Acceleration within the European Union and Beyond* (ed. Paul Blokker), Routledge, Abingdon, 2018, 228-229; Gábor Attila Tóth: Authoritarianism. In: *Max Planck Encyclopaedia of Comparative Constitutional Law* (eds. Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum) 2017; Arch Puddington: Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians, *Freedom House*, 2017.
[13] András Bozóki – Dániel Hegedűs: Constraining or Enabling? Democratic Backsliding in Hungary and the Role of the EU, Central Europe's Illiberal Turn: Research at the Bend, *European Studies Association Convention*, Denver, 9-11 May 2019; Drinóczi – Bien-Kacala, footnote 12; Tímea Drinóczi – Gábor Mészáros: An Abusive Neo-militant Democracy. In: *Neo-militant Democracies in Post-Communist Member States of the European Union*, (eds. Joanna Rak and Roman Baecker), Routledge, Abingdon-New York, 2022, 98-114.

to the list of definitions in this paper, the fact that rules on the special legal order in the midst of a pandemic can be changed strengthens the view that Hungary cannot be considered a constitutional democracy that prioritises the rule of law.

According to the general explanatory memorandum of the Ninth Amendment, the new regulation ("reform") *"realizes the reform of the constitutional regulation of the special legal order, clarifying the constitutional obligations related to defence and security, the related rights of the Parliament through changes in the forms of special legal order, the national referendum subjects, the constitutional regulation pertaining to the Hungarian Defence Forces, and the decision-making related to military operations".* The explanatory memorandum also confirms the reduction of the number of special legal order regimes, which was indeed high in international comparison,[14] by half, i.e. to three, and that the amendment aims to create a *"more modern and effective system, which can better adapt to the changing security environment and builds on the experience of crisis management in recent years",* while also incorporating additional guarantees. Furthermore, the detailed explanatory memorandum states that the systemic overhaul aims to ensure transparency and gradualness, in a modern way, adapted to the changing security environment (cyber warfare?), and with additional guarantees. However, it seems to contradict the principle of gradualness and the aim of providing additional guarantees that, as of 1 November 2022, the Government is the sole legislator in the case of all special legal order regimes, i.e. solely the Government is entitled to issue decrees in extraordinary situations (rule by decree). This development is not so surprising of course, given the Government's clear objective during the coronavirus epidemic and the war in Ukraine to extend the scope of its rule by decree (both in time and content) as much as possible.[15] The detailed explanatory memorandum also contains a very important additional statement, namely that in special situations there is a need for rapid, operational and legally and politically responsible decision-making, moreover, according to the proposed amendment, it is the Government which is able to do that with the highest degree of effectiveness in the domestic constitutional system.

Perhaps, the contradiction between the reality (the actual crisis management) and the content of the explanatory memorandum has become clear also to the readers of this paper. The experiences of the recent crisis management, from the misguided and ill-timed introduction of restrictive measures, the initial downplaying of the threat posed by the coronavirus and the abuse of the law to the weeks and months when Hungary was leading worldwide in mortality per capita, have actually confirmed the incompetence and the legal and political irresponsibility of the Government.[16]

Rather than discussing the more or less meaningless and contradictory explanatory memorandum, I will argue in the rest of the paper that the amendment was intended to guarantee exclusive power for the Government in relation to crisis management under the Fundamental Law. Such an amendment would, of course, be a clear enough sign of autocratisation, which is why the legislator has achieved this objective by making other modifications in relation to the special legal order, which, in essence, also serve no other purpose than to ensure the extraordinary power of the Government. In what follows, I will place the three new special legal order regimes (state of war, state of emergency, state

[14] When comparing the constitutions of several countries, the number of special legal order regimes in the respective chapters of the constitutions is between one and four in most cases, in comparison to which the previous six special legal order regimes (state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected attack, state of danger) in the Hungarian Fundamental Law was indeed outstanding. See: Attila Horváth: A különleges jogrend az alkotmányokban [The Special Legal Order in Constitutions]. In: *A különleges jogrend és nemzeti szabályozási modelljei [The Special Legal Order and its National Regulatory Models]* (eds. Zoltán Nagy and Attila Horváth), Mádl Ferenc Institute, Budapest, 2021, 627.

[15] For more details on this, see: Gábor Mészáros: Rule without Law in Hungary: The Decade of Abusive Permanent State of Exception, *EUI MWP Working Papers*, 2022/1.

[16] Ibid.

of danger) in a constitutional (Fundamental Law) context, and will then draw conclusions as to the actual impact of the amendment.

2.2. State of war

The new Article 49 of the Fundamental Law on the "state of war" (*hadiállapot*),[17] as also pointed out by the detailed explanatory memorandum of the amendment, combines the elements of the former "state of national crisis" (*rendkívüli állapot*) and the "state of preventive defence" (*megelőző védelmi helyzet*) as defined in the previous version of the Fundamental Law, while at the same time, in addition to the military-type special legal order scenarios, it also introduces a scenario aimed at dealing with non-armed threats that endanger Hungary's sovereignty and can therefore be considered of a similar gravity as an armed attack. It should be noted that the distinction between the state of national crisis under the provisions of the Fundamental Law in force until 31 October 2022 and the state of war, which more or less replaces the former, is not so simple. Declaring a state of national crisis was possible in the event of the declaration of a state of war or in the event of an imminent danger of armed attack by a foreign power, i.e. in the event of a danger of war.[18] By comparison, the state of war, previously only designated as a special situation,[19] becomes a *sui generis* special legal order regime under the new rules through the concept of danger of war being redefined. Whereas the Fundamental Law previously referred to the imminent danger of armed attack by a foreign power as a danger of war, the new wording does not qualify it as such. The imminent danger of attack by a foreign power is also excluded from the interpretative framework, since it falls under the category of external armed attack or the imminent danger thereof, which partly covers the second sub-scenario for ordering a state of war as a special legal order regime.[20] Moreover, the provisions on the new state of war, more or less taking over the previous provisions on the state of preventive defence and slightly modifying the definition contained therein, now additionally include as new elements the scenario of an actual external armed attack (as a special situation more than purely a threat) and an act with an impact

[17] (1) The Parliament may declare a state of war
a) if a war situation is declared or in the event of danger of war;
b) in the event of external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger of either of them; or
c) in the event of the fulfilment of allied collective defence commitments.
(2) For state of war to be declared, the votes of two thirds of the Members of the Parliament shall be required.
(3) During the period of state of war, the Government shall exercise the powers delegated to it by the Parliament, and shall decide on the deployment of the Hungarian Defence Forces abroad or within Hungary, their participation in peacekeeping, their humanitarian activity in a foreign operational area and stationing them abroad, as well as on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary and stationing them in Hungary.

[18] Fundamental Law, Article 48(1)(a) (as in force on 31 October 2022).

[19] The alpha and omega of the constitutional question related to a state of exception is the situation that may lead to this state, involving extraordinary measures and restrictions on rights. I will refer to these situations collectively as *special situations*, but it should be pointed out that not all special situations lead to a state of exception in all instances. In relation to that it is also an important question who can establish the existence of a special situation and at the same time decide on introducing a state of exception. A distinction can be made between special situations which are the result of direct human intervention (armed conflict, terrorist act, etc.) and those which, although they are the result of human activities, are no longer the direct result of human action (e.g. an economic crisis or industrial disaster). Finally, events of a purely natural character, such as natural disasters, constitute a separate group. See: Gábor Mészáros: *Alkotmányosság válságban [Constitutionalism in Crisis]*, Menedzser Praxis, Budapest, 2018, 30-32; Eric A. Posner – Adrian Vermeule: *Terror in the Balance – Security, Liberty, and the Courts*, Oxford University Press, New York 2007, 45; John Elster: Comment on the Paper by Ferejohn and Pasquino, *International Journal of Constitutional Law*, Oxford University Press, Oxford, 2004, 240. The state of exception is also an umbrella term which does not necessarily imply a special legal order separate from the ordinary legal order. However, in the present study, accepting that many constitutions consider the special legal order as a separate legal institution, I will analyse a legal institution regulated by the constitution. Therefore, I will consider the special legal order as a state of exception regime regulated in the Fundamental Law, which, however, cannot be interpreted without a special situation.

[20] Fundamental Law, Article 49(1)(b) (as in force on 1 November 2022).

equivalent to an external armed attack, as well as the threat thereof. The latter part of the definition, according to the explanatory memorandum, is intended to provide a possibility to deal with non-armed interventions, such as *"an attack of extraordinary force and of an overarching nature from cyberspace"* or *"an offensive use of non-armed effects"*. Finally, the scenario arising from fulfilling allied collective defence commitments, hitherto included in the definition of the state of preventive defence, is also now covered by the state of war.[21] It is also interesting to note that while in the context of declaring a state of national crisis, the Fundamental Law used the term "danger of war" to mean the imminent danger of armed attack by a foreign power, the new rules use the term in the context of the state of war,[22] but at the same time the original definition is also there, in a slightly modified manner, as a new sub-scenario, as follows: "*external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger of either of them".*[23]

Although the explanatory memorandum states that the new state of war replaces two previous special legal order regimes (the state of national crisis and the state of preventive defence), overall, it is about much more than that. In its original form, the Fundamental Law recognised as special legal order regimes the "unexpected attack" (*váratlan támadás*), and, following the Sixth Amendment to the Fundamental Law, as of 1 July 2016, the "state of terrorist threat" (*terrorveszélyhelyzet*).[24] The former, according to the original wording of the Fundamental Law, provided the Government with the possibility to take temporary measures until the declaration of a state of emergency or a state of national crisis in the event of an unexpected incursion of external armed groups into the territory of our country.[25] The reason for a change in this regard was that in the case of a state of national crisis, the primary recipient of extraordinary powers was the National Defence Council, while the President of the Republic was the primary recipient of extraordinary powers in the case of a state of emergency. As can be seen as well from the explanatory memorandum to the amendment, the legislator was of the view that in the domestic constitutional system, the Government is the most appropriate body for rapid and operational decision-making in exceptional situations. At this point, it is of course worth asking to what extent the Government, as a body, can be considered to be able to make decisions quicker than a one-person decision-making mechanism (the President of the Republic) or a mechanism involving another body (the National Defence Council) as decision-maker, similar to the Government – unless we understand this as individual decisions taken by the Prime Minister, but in that case it makes no sense to provide the Government as a whole with the decision-making powers. In any case, this was one of the legislative reasons for merging the unexpected attack into the state of war.[26] The explanatory memorandum attached to the Ninth Amendment to the Fundamental Law makes it clear that the new state of war combines elements of the state of preventive defence and the state of national crisis. In my view, however, referring to an imminent danger of an external armed attack or an act with an impact equivalent to it as included in the new rules would have been possible also in the event of the occurrence of acts falling within the scope of the previously existing regime of an unexpected attack. Although the Fundamental Law no longer contains the concept of an unexpected

[21] Fundamental Law, Article 49(1)(c) (as in force on 1 November 2022).
[22] Fundamental Law, Article 49(1)(a) (as in force on 1 November 2022).
[23] Fundamental Law, Article 49(1)(b) (as in force on 1 November 2022).
[24] For a critical analysis of the state of terrorist threat, see: Mészáros, footnote 19, 314-323.
[25] Fundamental Law, Article 52(1) (as in force on 31 October 2022).
[26] Another reason was the need, already expressed after the transition in connection with the Constitution, that the Constitution did not regulate the instance of unexpected incursions or deliberate violations of the airspace of the country by external armed groups (such as guerrilla groups) that cannot considered armed attacks by a foreign power, or unexpected air attacks. The Constitution did not originally provide for the possibility of a limited use of armed forces in such situations to repel an attack. The direct justification for the legislation at the time was the war in the Balkans. Cf. András Jakab – Szabolcs Till: A különleges jogrend [The Special Legal Order]. In: *Bevezetés az alkotmányjogba [Introduction into Constitutional Law]* (eds. László Trócsányi and Balázs Schanda), HVG-ORAC, Budapest, 2014, 259.

attack, Act CXL of 2021 on Defence and the Hungarian Defence Forces (hereinafter: Defence Act), which entered into force in November 2022, in its Chapter XVI entitled "Rebuffing an unexpected attack" partially reintroduces some of the previous provisions of the Fundamental Law and so the legal institution itself on a statutory level, while at the same time it obliges the Government to take measures proportionate to the attack in the event of an unexpected attack before initiating the declaration of a state of emergency or a state of war.[27] However, as will be seen later from the description of the statutory rules, the law leaves choosing the measures entirely to the Government, thereby granting it excessive extraordinary governmental powers within the framework of ordinary legal order.

The same applies to the state of terrorist threat, which was originally drafted to be declared in the event of a significant and direct threat of a terrorist attack or in the event of a terrorist attack.[28] It seems clear from the wording that this special situation can be substituted by the sub-scenario "*an act with an impact equivalent to an external armed attack, or imminent danger of either of them"* in the context of a state of war.[29] In other words, contrary to what is stated in the explanatory memorandum, the state of war does not merely replace the state of national crisis and the state of preventive defence, but also, to a certain extent, the unexpected attack and the state of terrorist threat as well. All this means that the state of war, although appearing as a single subheading in the Fundamental Law after the Ninth Amendment entering into force, can be equated in whole or in part with four previous special legal order regimes. Moreover, the special situations included in the new Article 49 of the Fundamental Law are not necessarily closely linked, which is also confirmed by the fact that the legislator has regulated them in three different subsections. In other words, the aim of rationalising the number of special legal regimes, as set out in the explanatory memorandum, has not been realized in practice. Therefore, the question now is what the legislator's real aim was with the "reform".

It is also emphasised in the explanatory memorandum, and it becomes clear after reading the rules on the individual special legal order regimes, that the procedures have been radically simplified compared to the previous ones, and that the role of the Government has been significantly enhanced. As in the case of the state of emergency earlier, the declaration of a state of war happens after a two-thirds vote in the Parliament. The two-thirds vote also means that the Government can rule by decree from that moment on, subject to certain restrictions (the guarantees will be discussed in more detail in Chapter 2.5.).

With the abolishing of the state of national crisis, state of war becomes the special legal order regime designed to avert the most serious developments, and it also entails the most severe restrictions of rights. Although the measures that may be introduced are not specified in the Fundamental Law, it is in any case foreseeable that the Government will have the most extensive special legal order powers in a state of war. It is also important to point out that the removal of the institution of the National Defence Council from the special legal order regulation does not merely mean that another body, in this case the Government, has exclusive decision-making powers (the explanatory memorandum states of course that this also serves efficiency), but it also means that the mechanism based on the principles of parliamentary democracy and including representatives of the opposition has been replaced with an unilateral decision-making mechanism which monopolises the winning party or parties in a constitutional system that is already quite government-dominated even under the ordinary legal order. Since the National Defence Council consisted of, in addition to the President of the Republic, the Speaker of the Parliament, the Prime Minister, the ministers and the leaders of the

[27] Defence Act, Article 108(1).
[28] Fundamental Law, Article 51/A(1) (as in force on 31 October 2022).
[29] See: Fundamental Law, Article 49(1)(b) (as in force on 1 November 2022).

parliamentary groups, opposition parties would have had at least the opportunity to participate in the decision-making process in the most severe special legal order regime (this is true even if, under the current circumstances, the Government and the public officials loyal to the government parties would have been in significant majority in the National Defence Council). The exclusion of the opposition from parliamentary decision-making is an increasingly serious phenomenon, of which the abolition of the National Defence Council and its replacement by the Government alone could be another example.

The Government may, following the authorisation by the Parliament (since the decision to declare a state of war is also an authorisation to govern by decree[30]) decide on the deployment of the Hungarian Defence Forces abroad and within Hungary, their participation in peacekeeping, their humanitarian activities abroad, on the stationing of the army abroad, and on the stationing of foreign armed forces (armed forces of NATO member states no doubt) in Hungary or their deployment from the territory of Hungary. The Fundamental Law provided virtually the same possibilities for the National Defence Council in a state of national crisis. This in itself should not be a cause for concern, but if we take into account that it is declared that the new rules of the state of war combine the scope of the previous state of national crisis and the state of preventive defence (and, as I have already pointed out, elements of the unexpected attack and the state of terrorist threat), the serious dilemma arises that the new rules grant the Government in the framework of the strictest special legal order regime the same powers that were (or would have been) previously only available to the National Defence Council in a state of national crisis. However, all these powers are now also available to the Government in less serious special situations, such as those to which the previous wording of the Fundamental Law sought to respond with the regimes of the state of preventive defence, the unexpected attack or the state of terrorist threat. In practical terms, this means that in less serious situations, such as the ones covered earlier by the state of preventive defence (allied commitments or the danger of an external armed attack), the new rules give the Government the same powers as in a war situation.

2.3. State of emergency

The rules on when to declare a "state of emergency" (*szükségállapot*) seem to show fewer changes than we have seen in the case of the state of war, but these seemingly minor changes make a significant difference in practice compared to the earlier rules. The earlier version of the Fundamental Law allowed the Parliament to declare a state of emergency in two cases,[31] which, at least in number, remain. However, the content of the new rules has been significantly amended as compared to the previous wording, and so, although the Parliament remains entitled to declare it, a state of emergency may be declared in the event of an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power, or in the event of a serious unlawful act massively endangering life and property.[32] In relation to the second scenario, it can be noted that the number of genuine specific situations is somewhat increased, given that it is no longer included in the provision that the act should be committed with weapons or with instruments capable of causing death, nor is the violent nature of the act a clear requirement. At the same time, the unlawfulness of the act is a new element in the definition. According to the explanatory memorandum, one of the intended aims of the amendment was to make the state of emergency rules applicable not only in the case of violent acts committed with weapons or with instruments capable of causing death, but also in the case of all unlawful acts in

[30] This is underpinned by the fact that the Government shall exercise powers delegated to it by the Parliament. Cf.: Fundamental Law, Article 49(3) (as in force on 1 November 2022).
[31] 1. In the event of armed actions aimed at overthrowing the lawful order or at exclusively acquiring power. 2. In the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death. Fundamental Law, Article 48(1)(b) (as in force on 31 October 2022).
[32] Fundamental Law, Article 50(1) (as in force on 1 November 2022).

a much more general way. Thus, since the violent nature of the act or to being committed with weapons or with instruments capable of causing death is no longer a prerequisite, it is now within the competence of the Parliament to decide whether an act is sufficiently serious and unlawful on the one hand, and whether it massively endangers life and property on the other. According to the explanatory memorandum, this rule of the state of emergency is intended to provide room for manoeuvre in the event that an act is harmful, offensive or subversive in relation to critical infrastructures or information technology. At this point, it is worth referring to the first part of the provision, which also does not require the act to be committed armed. Instead of "overthrowing the lawful order", it is now "overthrowing the constitutional order", and a new sub-scenario, the "subversion" of the constitutional order, is added. It is clear from the above that the amendment has led to a much broader range of instances in which a state of emergency may be declared, and what is most striking is that there is no longer a requirement that the actions serving as a basis for declaring a state of emergency are of a violent nature or that they are committed with weapons or instruments capable of causing death.

The concept of the state of emergency was distinguished from state of national crisis in both the Constitution and the Fundamental Law (until now) by the fact that the former was intended to provide a possibility for an extraordinary response to those acts and special situations which do not manifest themselves in an external attack but in an internal conflict, and thus massively endanger the security of life and property. In this respect, therefore, the state of emergency reacts not only to situations which are less threatening to the survival of the state, but also to situations which constitute an internal and not an external threat to the constitutional order. This concept, in the absence of any contrary formulation in the explanatory memorandum, can be considered applicable also with regard to the relationship between the new state of law and state of emergency. If we also accept the justification for the new regulation, i.e. that the amendment of the existing rules of the state of emergency (the broader scope of scenarios when it can be ordered) was necessary to allow for an effective defence against new security challenges arising in relation to critical infrastructure on the one hand and the development of information technology on the other hand, then the following can be generally deduced from the above: the primary objective of the new state of emergency rules is to address domestic threats that could affect critical infrastructure (e.g. power plants, gas storage facilities/ pipelines, etc.) and/or using modern technology as a tool, i.e. ultimately to ensure effective protection against domestic cyber-attacks. However, given that one of the explicit reasons for the amendment was also in relation to the state of war to provide for the possibility to act in the event of a cyber-attack, among other things, the declaration of a state of emergency in such situations becomes pointless. Namely, in the event of a cyber-attack *"with an impact equivalent to an external armed attack"*, the Parliament may declare a state of war. The same applies if a terrorist group carries out an attack *"equivalent to an external armed attack"*, even against critical infrastructure such as the Paks nuclear power plant. Both of these acts massively endanger life and property and can be considered serious and unlawful. Since the explanatory memorandum specifically refers in the case of both special legal orders regimes to acts committed by means of modern technology, the question arise as to which special legal order regime applies in the case of a cyber-attack or an attack on the Paks nuclear power plant. The situation is further complicated by the fact that the new regulation now makes no distinction in terms of who is entitled to take action, as it was the case in the past: the Parliament decides on declaring both regimes by a two-thirds majority, while the extraordinary power is granted to the Government.[33] In other words, in both cases, the initiator and the actor entitled to take measures are

[33] It is worth mentioning here that while the new Article 49(3) of the Fundamental Law explicitly names the Government as the body empowered to take measures under the subheading on the state of war, in relation to the state of emergency this

the same, just as the one who grants the extraordinary power. A further difficulty is that if we accept that in the examples mentioned above a state of war can be declared (even in the case of imminent danger), we can see that two special legal order regimes can be declared for the same specific scenario. The situation is not made any easier by the fact that while the provisions on the state of war do not specify the subject matter of the threat, but merely identify the endangering conduct(s) (i.e. an act equivalent to an external armed attack or an imminent danger thereof) and the "external", i.e. foreign nature of the potential perpetrators, in the case of a state of emergency, the relevant element is practically exclusively the scope of those in danger / the scope of the threat (safety of life and property). Moreover, the "imminent danger" sub-scenario of the state of war can also be applied in the case of a milder danger, whereas the originally milder special legal order regime, the state of emergency, can only be declared if the act committed is unlawful. This may result that if the safety of the Paks power plant would be threatened by an act of terrorism (the impact of which, if it were to occur, would be equivalent to a massive threat to life and property), then a state of emergency could not (since that would require the occurrence of the act and imminent danger alone is not sufficient), but a state of war could be declared. As it has already been mentioned, in the event of an actual terrorist attack on the Paks power plant, both a state of war [based on Article 49(1)(b) of the Fundamental Law, applying the "*an act with an impact equivalent to an external armed attack"* part] and a state of emergency [based on Article 50(1)(b) of the Fundamental Law] could be declared. The only difference between the two may be that the state of war refers explicitly to an "external" attack, whereas no such distinction can be made in the context of the state of emergency. In other words, it follows that the state of emergency is mostly applicable to internal, unlawful acts, even if the Fundamental Law and the explanatory memorandum attached to the amendment are silent on this point. Of course, it is questionable how, beyond reacting to otherwise known mass unlawful acts (e.g. a revolution aimed at overthrowing the regime), the aim included in the explanatory memorandum, i.e. that acts committed in relation to critical infrastructure or via means of information technology can be responded to by a state of emergency, is realized into practice. For example, can a cyber-attack launched by an individual perpetrator from within the country (or from abroad, but using a domestic IP address?) be the basis for a state of emergency if its effects are massively threatening, and, if so, can the special legal order fulfil its purpose? Would not the possibility of a mass restriction of rights be more damaging while the identity of the attacker is being sought under the auspices of a state of emergency? At this point, the special legal order would cease to be special, as it would be helping a specific law enforcement objective, while at the same time restricting the rights of masses of people. In any event, it is a principle providing guarantees that special legal order rules should not merely be clearly distinct from the ordinary legal order, but that a distinction between the individual special legal order regimes should also be ensured, which in the present case is problematic in the light of the above.[34]

It is also worth analysing the other sub-scenario of the state of emergency, namely that which allows the declaration of a state of emergency in the event of an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power.[35] Compared with the regulation in force earlier, which followed the terminology of the Constitution, the term overthrowing the "constitutional order" has been replaced by the term overthrowing the "legal order", a change which seems reasonable from a legal dogmatics point of view. However, if one considers that the amendment to the Fundamental Law was adopted before the elections, at a time when the legitimacy (and legality) of the Fundamental

can only be inferred from the common rules on special legal order regimes, which clearly imply that in all special legal order regimes the Government is the body exclusively empowered to take measures (beyond the initiation of the regimes).

[34] Cf.: Mészáros, footnote 19, 266-268.

[35] Fundamental Law, Article 50(1)(a) (as in force on 1 November 2022).

Law has started to become the subject of constitutional debates once again, it is easy to assume that this small modification is intended to protect the Fundamental Law, and, above all, the constitutional regime established by the two-thirds governmental majority, rather than constitutionalism in general.

It should also be stressed that the possibilities of declaring a state of emergency are now much wider than previously, and this is not only due to the inclusion of the term "constitutional order", but also to the seemingly minor amendment that, even in this special situation, there is no reference to the "armed" nature of the act. The official justification for this has already been mentioned (i.e. to make it possible to declare a state of emergency in the event of an act not committed with weapons but by other means, including, among others, info-communication, modern technology as well), but this makes the applicability of the provision spectacularly uncertain (and not only because of the similarity with the state of war as referred to above), which raises serious concerns from the point of view of the rule of law.

In this context, it should be pointed out that the domestic constitutional solution implements a so-called dichotomous state of exception model. The dichotomous model expresses the idea that constitutions must provide special rules for exceptional situations, because in such situations the constitutional means of state action are not always sufficient to maintain security and effective protection. The theoretical basis of the model is therefore that the law, by its very nature, operates by applying rules, and exerts its effect through regulation, while the characteristic of exceptional situations is that they are not foreseeable and therefore not always suitable for prior regulation.[36] One of the main arguments in favour of the dichotomous model is that the rules laid down in the constitution can be used to control emergency powers and prevent the perpetuation of the state of exception, i.e. the transition to dictatorship. From the point of view of the rule of law, the most important issue is whether, in addition to exerting defence against the special situation and exercising excessive powers that often inevitably goes hand in hand with the former, a minimum level of fundamental rights protection can be guaranteed, and ultimately whether the restoration of constitutional democracy is ensured. Dichotomous models with built-in procedural guarantees are intended to serve this purpose. I will cover the various guarantees later in this paper, but a very important criterion must be mentioned already at this point. One of the indispensable requirements of the rule of law and legal certainty in relation to legal norms is the clarity of the norm, the lack of which raises serious concerns due to the possibility of abusing the special legal order.[37]

It is also important to point out in the context of the increased role of the Government with regard to special legal order that although formally it is the Parliament which declares a state of emergency (and the state of war as well), this decision is rather constrained, as the underlying special situation is invoked by the Government, which is informed of the threats first-hand through the internal affairs agencies. Thus, it is not only the identification of an "act aimed at overthrowing the constitutional order" as a special situation which poses a problem, but also that of the newly introduced case of "subverting the constitutional order". Indeed, subversion is a term unknown in the modern domestic

[36] The classic example of this argument can be seen most clearly in the theory of Carl Schmitt. Schmitt takes it for granted that ordinary legal order does not contain rules for special situations. Its starting point is Robert von Mohl's theory that the decision whether a given situation can be considered a special situation cannot be a matter of legal interpretation, or, more precisely, a matter of the application of the law. Cf.: Robert von Mohl: *Staatsrecht, Völkerrecht und Politik: Monographien*, Verlag der H.Laupp'schen Buchhandlung, Tübingen 1860, 626. Schmitt argues that liberal constitutionalism is incapable of interpreting the importance of the *decision*, which is considerably enhanced in special situations. The decision on the state of exception, however, is a decision in the strictest sense of the word. For an ordinary legal norm is incapable of recognising all forms of special situations, so the response given to a special situation cannot be of an ordinary legal nature. For more details, see: Carl Schmitt: *Politikai teológia [Political Theology],* Budapest, ELTE ÁJK, 1992 (translated by Péter Paczolay).

[37] Mészáros, footnote 19, 322-323.

constitutional system,[38] i.e. it depends to a large extent on the Government as the initiator of the special legal order[39] (being at the same time also the one entitled to take measures) to decide whether an act or event in a given situation amounts to subversion. The deficiencies in the terminology, and the fact that the violent, armed nature of the respective act is no longer a precondition for a state of emergency, and so the Government having undue discretionary power in this regard, is a matter of serious concern. Any act, not necessarily violent or armed and not even aimed at exclusively acquiring power, may be an act against the "constitutional order", since the word "or" makes it quite clear that a conduct aimed only at the overthrowing of the constitutional order "or" the "subversion" of the constitutional order "or" the exclusive acquisition of power all amount to exceptional situations which may, in themselves, justify the declaration of a state of emergency. Moreover, it does not follow from the interpretation of the text that mass or group conduct is required. Replacing the term of lawful order with that of constitutional order justifies the conclusion that taking a public stance against the Fundamental Law, and in particular actions stating that it is invalid, could even be the basis for a state of emergency, which would be absurd in a constitutional democracy. More realistically, civil disobedience, demonstrations by teachers and students or autonomy protests could be considered by the Government attempts to subvert the constitutional order, regardless of their peaceful nature. After 1 November 2022, teacher and student demonstrations and civil disobedience in the context of performing educational activities, which are taking place at the time of writing the present study, could very easily be considered by the Government subversion of the constitutional order, which could lead to the declaration of a special legal order, having unforeseeable consequences.

2.4. State of danger

The least radical change compared to the previous version of the Fundamental Law occurred in relation to the "state of danger" (*veszélyhelyzet*). Although originally not included in the Ninth Amendment, the Tenth Amendment to the Fundamental Law supplemented the rules on the state of danger with

[38] The terminology was used by the legislation between the two world wars, such as Act III of 1921 on the More Effective Protection of the State and Social Order, the first subheading of which was *"Felonies and misdemeanours aimed at the subversion or destruction of the state and social order",* and in the context of which subversion meant the level of violence against the lawful order of the society and the state (not of the constitutional order) that preceded "destruction". Another piece of law, also from an inglorious period of domestic legislation, Article 5 of Act XVI of 1938 on the Criminal Law Provisions Necessary for the Preservation of State Order, also refers to the term *"violent subversion and/or destruction of the lawful order of the state and society"* in the 1921 law already mentioned, but at the same time extends individual perpetration to include group conducts (such as a movement or conspiracy) in the case of which, although they are not expressly or admittedly aimed at the violent subversion or destruction of the lawful order of the state and the society or forcibly establishing the exclusive rule of a social class, it is nevertheless "*apparent from the object, manner, in particular its secrecy, commitment by oath, solemn oath or solemn promise, or other circumstances of the movement or conspiracy that they involve a risk of unlawful change in the lawful legal order*". The phrase *"aimed at the subversion or destruction of the lawful order of the state and society"* also appears in another piece of legislation from the era, in Act XIX of 1938 on the Election of Members of Parliament, Article 75(2) of which excludes from standing as candidates those whose party programme or political objectives fall under this category. In addition to the 20th century examples mentioned above, subversion is also covered by certain elements of our so-called "historical constitution", such as the Transylvanian Act VI of 1744 on the "confirmation of the privileges of bodies and orders composed of three nations of the Principality of Transylvania and the Hungarian parts annexed thereto, in both ecclesiastical and secular matters, and on the amendment of the article on the union contained in Section 1 of Part III of the Approbata Constitutio", which states that *"[t]he decisions contained in the relevant section of the royal decision [...] cannot and shall not be extended to the common people and the sons of the priests taken from among the people, so that the constitutional organisation of this principality is free from subversion and that nor the Wallachians, nor other newcomers are of considerable number among the nations; and so that these are not to the detriment of any of the three nations and their rights, privileges, immunities and prerogatives".* In addition, the *Tripartitum*, which is held in high esteem by the present Government and by jurists close to its ideology, mentions as an element of disloyalty in Article 8 of its "*Title 14 – On the cases of the crime of disloyalty"* those who "*bring in foreign raiders or mercenaries to subvert the internal state of the country".*

[39] Fundamental Law, Article 54(5) (as in force on 1 November 2022).

those rules already introduced because of the Ukrainian-Russian war, which were, for that matter, criticised.[40] Several of the seemingly few amendments are worth highlighting. First and foremost, a state of danger can be declared no more *"in the event of a natural disaster or industrial accident endangering life and property"*, but rather in the event of *"a serious incident endangering life and property*", with natural disasters or industrial accidents being only examples of the latter.[41] This change is more than a textual clarification, since the Government can now in practice react to any event seriously endangering the safety of life and property by means of this special legal order regime (i.e. it is not conditional on the occurrence of any event, since it can be introduced for purely preventive purposes as well). This is therefore in line with the method described above, which seeks to strengthen the special legal order powers of the Government in terms of taking measures. Perhaps also drawing on the experiences (and the criticisms) of the state of danger declared during the coronavirus epidemic, the Fundamental Law now provides for the extension of the state of danger as a special legal order regime itself, rather than the Government's state of danger decrees. Accordingly, a state of danger may be declared for thirty days,[42] but the Government may extend it on the basis of an authorisation by a two-thirds majority vote in the Parliament, provided that the conditions for its declaration are still met. At the same time, the Fundamental Law no longer provides that the Government's state of danger decrees remain in force after fifteen days only if the Parliament authorises the Government to extend their force.[43] However, there is still no objective time limit for the extended state of danger.[44] Thus, the parliamentary control over state of danger decrees,[45] which has not been functioning in practice anyway, but which previously provided a certain guarantee under the Fundamental Law, is thus abolished, and the *carte blanche* authorisation of the Government to issue extraordinary decrees has become possible also under the Fundamental Law.[46]

This is confirmed by the fact that, in connection with the new Article 51(3) of the Fundamental Law (prior to its entry into force), the Parliament adopted an amendment to Act XCIII of 2021 on the Coordination of Defence and Security Activities (hereinafter: Defence and Security Coordination Act). On the basis of Act XXXII of 2022 on Amending Act XCIII of 2021 on the Coordination of Defence and Security Activities in relation to the Extension of the State of Danger, the Defence and Security Coordination Act entered into force with a new Article 82/A, which sets out that the Parliament's authorisation to the Government to extend the state of danger can be granted for a period of 180 days per occasion. Although ostensibly a time limitation, this rule effectively codifies the unconstitutional practice that has manifested itself in the Government's *carte blanche* authorisation during the state of danger. Under the new rules, the Parliament's power of review over individual extraordinary government decrees has thus been removed, leaving it with only limited control powers in relation to the extension of the state of danger as a whole. The extension of the state of danger ordered by the Government for a maximum period of thirty days may be initiated by the Government itself before the expiry of that period, which may be authorised by Parliament, but the legal act of extending the state

[40] Mészáros, footnote 6.
[41] Fundamental Law, Article 51(1) (as in force on 1 November 2022).
[42] Fundamental Law, Article 51(2) (as in force on 1 November 2022).
[43] It is worth noting that the most debated step from a constitutional law aspect was that of the so-called enabling (or authorisation) acts during the state of danger, which originated from this very rule (moreover, myself and several others argued for the enabling acts' unconstitutionality; see Mészáros, footnote 3; Mészáros, footnote 5; Szente, footnote 5). I would add that the significance of this earlier provision as a guarantee was not affected by the misinterpretation of the provision. The purpose of the special legal order guarantees is not to assist the one entitled to take measures (in this case, the Government) in exercising its extraordinary powers, but to protect constitutional democracy and the rule of law, even if the respective rules are "inconvenient" in certain cases.
[44] Fundamental Law, Article 51(3)-(4) (as in force on 1 November 2022).
[45] Cf.: Fundamental Law, Article 53(3) (as in force on 31 October 2022).
[46] See: Mészáros, footnote 2; Mészáros, footnote 3.

of danger is now carried out by the Government. Article 82/A of the Defence and Security Coordination Act ensures that the extended state of danger may remain in force for 180 days (counting also the 30-day rule in the Fundamental Law, this amounts overall to 210 days), although neither the Defence and Security Coordination Act, nor Fundamental Law rule out the possibility of a subsequent authorisation. In fact, it is not difficult to conclude from the wording "per occasion" that the legislation expressly allows for repeated authorisations of up to 180 days. Although the Fundamental Law provides for the possibility of extension only if the circumstances serving as grounds for the declaration of the state of danger continue to exist, the Government would hardly be constrained by this provision in its abuse of extraordinary powers. Moreover, the new rules allow the Parliament to also authorise the Government to keep in force state of danger decrees that have not yet been adopted and so the content of which cannot be reviewed by the Parliament. As I will present in detail later, the overall effect of the removal of the detailed rules on the special legal order from the domestic legal framework is that the Government becomes entitled to exercise unlimited, dictatorial powers in a state of danger (but the same is true, even if in a less spectacular fashion, in the case of all special legal order regimes). The "time limit" of at least 210 days (on the basis of the above, one can hardly suppose that the Government would return its extraordinary powers, resulting from the 30-day and then the at least 180-day further authorisations, earlier than it has to) cannot be considered meaningful, since there is no other rule of law guarantee in the system.

2.5. Separation of powers; guarantees

In the dichotomous models mentioned above, the restoration of the rule of law after dealing with a special situation is a priority. Guarantees for that may vary in their realization from one constitutional system to another, and are also highly procedural in nature. The detailed elaboration of the rules of the special legal order, and hence the establishment of guarantees (e.g. the scope of fundamental rights that cannot be limited) in these constitutions can be seen as a reaction to the fall of the Weimar Republic and the erosion of the Weimar constitutional system.[47] The Hungarian Constitution, but especially the Fundamental Law, has adopted this solution in terms of the regulation and especially the guarantees, which is otherwise widely used (the German and South African models shall be highlighted from among the best known examples) and is based on the principles of Kelsen.

Compared to the original concept of the Fundamental Law, the Ninth Amendment did not change the solution that the most important guarantees are included under the "Common rules for special legal order"[48] subheading. Following the amendment, the previously known rules were retained, with some restructuring. Thus, it is set out that the application of the Fundamental Law shall not be suspended in a special legal order, that certain fundamental rights cannot be restricted even in a special legal order, or there is the procedural guarantee that the organ entitled to declare the special legal order shall terminate that if the conditions for its declaration no longer exist. In relation to this, it is also now generally stated (since the Government is the one entitled to take measures under all three special legal order regimes) that the Government's special legal order decrees shall cease to have effect once the special legal order is terminated.

Another rule that can be regarded as a guarantee, which has also only been fine-tuned for the renewed regulatory system, is that the Government may, via special legal order decrees, suspend the application of certain Acts of Parliament, derogate from certain provisions of the Acts of Parliament,

[47] Cf.: Kim Lane Scheppele: Law in a Time of Emergency, *Faculty Scholarship at Penn Carey Law*, 2004/53, 4.
[48] Cf.: Fundamental Law, Article 54 (as in force on 31 October 2022).

and take other extraordinary measures.[49] At this point, the average reader is likely to overlook a significant change, namely as regards the content of special legal order decrees. Although the reference in the Fundamental Law to the extraordinary measures as provided for in a cardinal Act of Parliament (cardinal law) as a limitation on the Government's special legal order powers has been retained in appearance, in practice the earlier restriction on extraordinary measures has been removed. Whereas the Fundamental Law previously stipulated in the case of the individual special legal order regimes that the actor entitled to take measures (the National Defence Council, the President of the Republic, and the Government) *"may introduce extraordinary measures laid down in a cardinal law",* the Ninth Amendment to the Fundamental Law allows the Government to adopt decrees in a special legal order *"as provided for by a cardinal law"*. This "guarantee" is less binding on the Government's freedom to issue extraordinary decrees, since, unlike before, it can no longer only introduce the extraordinary measures laid down in the Acts of Parliament on defence and disaster management (the latter law contained rules with regard to the state of danger), but can issue extraordinary decrees within the framework provided for in a cardinal law, at its own discretion.

As far as guarantees are concerned, the changes that are mostly related to the role of the Government in terms of the special legal order, and thus to the significant strengthening of this role compared to the previous regulation, can be considered significant. Bearing in mind that the Government is empowered to initiate the state of war and the state of emergency and is entitled to declare a state of danger, and that it is the actor empowered to take measures in all special legal order regimes, the amendment to the Fundamental Law, while formally complying with the requirements flowing from the rule of law, contains a number of new provisions which can be linked to this elevated role. For example, it has been made the obligation of the Government to guarantee the continuous operation of the Constitutional Court and the Parliament during a special legal order (and with respect to the former, the prohibition of restricting its operation is also included in the text, just as in the provisions of the Fundamental Law in force until 31 October 2022). The question is, however, how the Government shall (should) ensure the operation of these two important bodies during a special legal order. Unfortunately, the explanatory memorandum does not provide any guidance on this point either, and in any case, the provision of such a guarantee can hardly be interpreted as an effective institutional guarantee to prevent the Government from potentially abusing its extraordinary powers. At the same time, the Constitutional Court's power to review extraordinary decrees is still not clearly stated, although this power under the new regulation can be inferred from what we have experienced in relation to the state of danger decrees. It is true however that we have not seen so far a review court with "strong" powers which would uphold the rule of law and fundamental rights.[50]

Compared to the above, the rule that provides the Parliament the possibility to repeal the Government's extraordinary decrees[51] can be considered a substantial restriction, even though this

[49] Fundamental Law, Articles 52-53 (as in force on 1 November 2022).
[50] Cf.: Mészáros, footnote 15.
[51] Fundamental Law, Article 53(3) (as in force on 1 November 2022). It is worth mentioning here that in my opinion, Article 10(3)(a) of Act CXXX of 2010 on Law-Making (hereinafter: Law-Making Act) cannot be (could not have been) applied in relation to extraordinary government decrees. Article 1(2)(b) of the Law-Making Act makes it clear that different rules may apply to special legal order legislation. Although the Law-Making Act clearly refers here to the "Act of Parliament on measures that may be introduced in a special legal order", source of law issues were not addressed either by Act CXIII of 2011 on Defence, the Hungarian Defence Forces and on Measures that May Be Introduced in a Special Legal Order (hereinafter: Old Defence Act), in force until 31 October 2022, nor, in the context of the state of danger, by Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament (hereinafter: Disaster Management Act). Like the Fundamental Law, these merely provided that extraordinary decrees may suspend or derogate from provisions of Acts of Parliament. Since no specific rules could be found at the statutory level, the starting point must be the text of the Fundamental Law (as in force earlier), which links the temporal validity of all special legal order decrees to the end of the special legal order. Thus, for example, in the state of danger, the Parliament could not (have) constitutionally adopted an

has hardly any significance as a guarantee under the current two-thirds governing majority in the Parliament. What is interesting about this rule, however, is that the Fundamental Law does not require a qualified majority vote in the Parliament, and so it can be deduced that a simple majority is sufficient to limit the Government's "rule" by decrees. However, as it is rather difficult to imagine the possibility of a minority government in the domestic context based on the experiences so far, we can say that this restriction in the Fundamental Law is practically a *lex imperfecta*, as the Government, which would act with a special legal order authorisation, would be restricted by the governing party (or parties) having a majority in the Parliament via a law passed by a simple majority.[52] Moreover, at this point, the question arises as to why the amendment does not emphasise the deregulatory role of the Constitutional Court here, or why it does not mention it in addition to the Parliament. It is also unclear on what grounds the decrees can be repealed, not to mention the fact that, in the framework of a crisis management, the Parliament is less well placed to duly assess the impact and purpose of specific special legal order measures.

If the Government exceeds its extraordinary powers, i.e. if its decree is unconstitutional, it would have been even more reasonable to clearly involve the Constitutional Court in some form in the controlling of excessive power. Furthermore, the constitutional law background of the Parliament's respective power, or more precisely, the origin of this special power, is not clear. The background is probably that in a state of emergency and a state of war, the Parliament grants the authorisation, while in the case of a state of danger the Parliament may authorise the Government to extend it, but these powers are related to the special legal order authorisation and not to the special legal order measures. In other words, if the Fundamental Law were consistent, it would not entitle the Parliament to repeal extraordinary decrees, but instead it would empower it to revoke the Government's special legal order powers on the grounds that the latter had abused those powers. Of course, a rule approximating this can be found in the Fundamental Law, allowing the Parliament, as the organ entitled to declare the special legal order, to terminate the special legal order if the conditions for its declaration no longer exist (except in the case of the state of danger). However, the power to repeal an extraordinary government decree is more of a punitive nature, the essence of which is repealing the relevant decree of the Government that has abused its extraordinary powers even if the conditions for the declaration of the special legal order otherwise still exist. At this point, it is worth reiterating the omitted but important role of (constitutional) judicial review.

It is similarly an ostensible, rather than a substantive guarantee that if, for some currently unimaginable reason, the Parliament repeals a special legal order decree of the Government, the

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Act of Parliament repealing extraordinary government decrees. The Fundamental Law merely allowed the Parliament not to extend the force of already adopted extraordinary government decrees after the initial fifteen days, which result (would have resulted) that the decrees lose their force by virtue of the Fundamental Law. It should be noted that, as I have already pointed out, no interpretation of the previous provisions of the Fundamental Law could have led to the conclusion that the Parliament could give the Government a *carte blanche* authorisation to extend the force of government decrees that had not yet been adopted. This practice, for that matter, has resulted in the elimination of the only substantive constitutional guarantee during the pandemic. Moreover, extraordinary government decrees may also provide for the suspension of Acts of Parliament or their different applicability, and in this respect, they are superior to ordinary Acts of Parliament in the hierarchy of legal sources. This means that Article 10(3)(a) of the Law-Making Act could not be applied to special legal order decrees.

[52] Although this is not provided for by the Fundamental Law, in any event, the most important task of the Parliament on the one hand is to legislate (to issue Acts of Parliament), and on the other hand we have seen in the context of the coronavirus epidemic that the sources of law adopted by the Parliament in relation to the extraordinary powers of the Government were Acts of Parliament. It is worth noting that is raises an interesting question from a codification point of view as to what extent "repealing" the sources of law adopted under the special legal order by ordinary legislative means meets the fundamental requirements of the rule of law pertaining to law-making. From this aspect, it might have been a welcome development if the Fundamental Law had declared that the deregulation provision should be adopted at the level of an Act of Parliament as a source of law.

Government shall not adopt the given decree again with identical content, unless this is *"justified by a substantial change in circumstances"*. The Government should inform the President of the Republic, the Speaker of the Parliament and the relevant parliamentary committee of this substantial change in the circumstances and the re-adopted decree. Just like the "control role" of the Parliament, these "guarantees" are of no substantive significance either, since if the majority of the Parliament were to repeal a government decree for whatever reason, the Government could, if the measure is important to it, invoke a change in the circumstances at practically any time (it is the specificity of exceptional situations that circumstances can change rapidly and take unexpected turns), while it merely has an obligation to inform the other actors when re-adopting a decree, and the Fundamental Law does not provide for any sanction in this context.

The Fundamental Law gives the Parliament a rather important role in terms of declaring, terminating or extending special legal order, even if this does not always mean substantive control, as discussed above. In this context, several guarantees seek to ensure the continuous operation of the Parliament. For example, it may not dissolve itself or may not be dissolved during a state of war or a state of emergency, nor can parliamentary elections be called or held during such a period, but at the same time the President of the Republic can convene the Parliament that has dissolved itself or has been dissolved.[53] Although these rules do not seem to be of great importance, given the current parliamentary majority and the fact that it is much easier to impose the new special legal order regimes (in particular the state of emergency) than it was before, the possibility that the two-thirds majority (and at the same time, the Government) uses the special legal order to avoid a possible future electoral defeat cannot be excluded. As we have seen earlier, the concept of an unlawful act aimed at subverting the constitutional order gives the Government, as the initiator of the special legal order, a rather wide discretion, and, moreover, if the Parliament declares a state of emergency, from that moment on it is up to the Government how long it maintains it, using the provisions included in Article 55 of the Fundamental Law, thus postponing the parliamentary elections. While the provisions of the Fundamental Law do not provide for an objective time limit in the case of the state of war, a state of emergency can be declared for a maximum of thirty days, but the Parliament can then practically extend it again by a two-thirds majority. We have already seen an example of this in the case of the state of danger declared because of the coronavirus, so a state of emergency becoming permanent is not an unthinkable scenario.[54]

3. Special legal order and crisis rules in cardinal law(s)

3.1. Rules of operation of the special legal order

It can be stated in relation to the Ninth Amendment to the Fundamental Law, which entered into force on 1 November 2022, that it not merely enhanced the role of the Government in a special legal order, but the Government practically became the sole actor, especially in the current parliamentary and political context. Furthermore, it has become clear in relation to the state of danger declared because of the coronavirus that the Government used crisis management also for political gain, in several cases in a manner contrary to the text or spirit of the Fundamental Law.[55] Thus, for those who still believe in the rule of law, the only hope left is the possibility of *ex post facto* accountability. However, the Ninth Amendment to the Fundamental Law almost rules out this possibility, and the detailed special legal order measures, which are important when it comes to accountability, have been removed from the

[53] Fundamental Law, Articles 55-56 (as in force on 1 November 2022).
[54] Mészáros, footnote 3; and Mészáros, footnote 15.
[55] In detail, see: Mészáros, footnote 3.

respective cardinal laws as of 1 November 2022. The relevant provisions of the Defence and Security Coordination Act, in force as of 1 November 2022, which will be presented below, are too general to formally impact the Government's power to take extraordinary measures. In other words, the Government can take extraordinary measures at its own discretion, with only a semblance of parliamentary control. Chapter XI (Articles 64-79) of the Old Defence Act as a cardinal law regulated in detail the scope of extraordinary measures that could be introduced after the declaration of the individual special legal order regimes, in compliance with the requirements included in Article 54(4) of the Fundamental Law. This was not only important from a purely practical point of view, but also served as a guarantee to prevent the abuse of extraordinary powers. Thus, the National Defence Council, the President of the Republic or the Government could only introduce measures as defined in the Old Defence Act in a special legal order. If they had not done so, the Parliament, as the organ entitled to declare the special legal order, or the Constitutional Court, could (in theory) have called the Government to account, as the body entitled to take measures, for its unlawful and ultimately unconstitutional abuses of power. It is also important to note that the Old Defence Act only contained rules pertaining to the state of national crisis, the state of emergency, the state of terrorist threat, the state of preventive defence and the unexpected attack from among the special legal order regimes. Similar rules pertaining to the state of danger, i.e. the measures that may be introduced by the Government, were laid down in Articles 44-51/A of the Disaster Management Act.

The new provisions of the Fundamental Law on the special legal order refer to provisions laid down in cardinal laws several times.[56] With the entry into force of the new special legal order rules, however, the above, detailed rules of action disappeared from the domestic legal system, and neither the Defence Act, nor the Disaster Management Act contain any cardinal law rules that would bind the scope of the Government's special legal order measures in such detail as before.

Thus, measures that can be introduced in a special legal order are no longer regulated in detail by a cardinal law as before, and in this context, in practice, only Articles 80-81 of the Defence and Security Coordination Act are applicable, which, although also being cardinal law provisions, are significantly less detailed than the provisions of the Defence Act and the Disaster Management Act as in force earlier. Since neither the amendment of the Defence Act and the Disaster Management Act, nor the adoption of a new cardinal law limiting the measures that can be taken by the Government is pending at the time of finalising the manuscript of the present study, it can be reasonably assumed that in the future, the cardinal law referred to by the Fundamental Law will equal Articles 80-81 of the Defence and Security Coordination Act.

First of all, the Defence and Security Coordination Act practically repeats Article 54(1) of the Fundamental Law, adding that the purpose of extraordinary government decrees is *"to guarantee for citizens the safety of life and health, personal safety, the safety of assets, and legal certainty, as well as the stability of the national economy"*.[57] The next paragraph lists the regulatory subjects in relation which the Government may exercise its powers, such as personal liberty and living conditions, economic and supply security, restrictions with a security purpose affecting communities and the provision of information to the population, the functioning of the state and local governments, the

[56] Namely, first of all, in the framework of the common rules for special legal order, Article 52(5) of the Fundamental Law, which provides that the detailed rules to be applied during the period of special legal order shall be laid down in a cardinal law, or Article 53(1) of the Fundamental Law, which limits the Government's powers to adopt decrees in a special legal order *"as provided for by a cardinal law"*.

[57] The final part of Article 80(1) of the Defence and Security Coordination Act. It is worth mentioning that this rule is a verbatim copy of the 2020 amendment to the Disaster Management Act, which was incorporated into the rules of the Disaster Management Act pertaining to the state of danger by Act LVIII of 2020 on the Transitional Provisions Related to the Termination of the State of the Danger and on Epidemiological Preparedness.

protection or restoration of lawful order, public order and public security, or national defence and mobilisation.[58] Although these subjects (despite the general wording) to some extent tie the hands of the Government empowered to take measures, the last point of the list nevertheless makes the Government's possibilities in terms of taking extraordinary measures virtually unlimited. Article 80(2)(g) of the Defence and Security Coordination Act provides that the Government may exercise its extraordinary powers in other regulatory areas not included in the list above that are directly related to the prevention, management, elimination, and the prevention or remedying of the harmful effects of an event giving rise to a state of war, state of emergency or state of danger. However, the following paragraph sets out as a general limitation that the Government may exercise its powers in alignment with the management of the emergency situation, to the extent necessary and proportionate to the objective pursued. At the same time, as we have seen earlier, the Fundamental Law does not contain any substantive guarantees against the abuse of special powers, so this rule can at most only be a guiding yardstick for self-limitation by the Government.

A similarly insignificant provision, which hardly establishes anything more than the rules of the Fundamental Law, is the provision on the necessity and proportionality of restrictions of fundamental rights, a test which applies also in ordinary legal order circumstances otherwise. However, Article 81 of the Defence and Security Coordination Act, confirming the relevant rule of the Fundamental Law, confirms a stricter "special legal order necessity and proportionality test" than the general necessity and proportionality test, according to which restricting fundamental rights is possible to the proportion necessary to manage the special situation. In other words, this rule does not provide for more rights protection than what is already laid down in Article 52(2) of the Fundamental Law (at most, one could rely on the Government's self-limiting behaviour). In addition, according to Article 81(2) of the Defence and Security Coordination Act, rights can only be suspended if the less severe restriction does not lead to a result in terms of managing the special situation. This principle of gradualness, which applies generally as well, in theory determines the Government's room for manoeuvre, but in practice the problem is again that it is rather cumbersome to hold the Government accountable during a special legal order, and, in addition, the review power of the Constitutional Court has not been clearly stated, as I have already mentioned in connection with the relevant sections of the Fundamental Law. Nor does the Defence and Security Coordination Act delegate the review or control function to an independent body, and it merely provides that the requirements relating to the restriction and suspension of fundamental rights cannot be derogated from, and that the Government is obliged to ensure that they are continuously complied with. Ultimately, it is the Government itself that makes the decisions on the restriction of rights, and the same body is responsible for ensuring the protection of fundamental rights. In other words, under these rules, in a special legal order, the Government is not only the supreme actor in terms of taking measures, but also the sole enforcer of the protection of fundamental rights. Thus, the body which, under the new rules, has the exclusive right (and obligation) to impose extraordinary measures, including the restriction on rights, is at the same time also exclusively responsible for ensuring that those same rights are not infringed to an extent greater than it is necessary in order to deal with the special situation.

3.2. State of national defence crisis

The Defence Act that entered into force in November 2022 does not contain a detailed package of extraordinary measures similar to the Old Defence Act, but it does contain a legal institution aligned with the previous state of preventive defence, namely the "state of national defence crisis"

[58] Defence and Security Coordination Act, Article 80(2).

(*honvédelmi válsághelyzet*), which can be applied before the declaration of a state of war, but which is not intended for use in the case of immediate danger.[59] The state of national defence crisis may be ordered by the Government if justified by the domestic effects of a crisis in a neighbouring state requiring also military management and directly threatening Hungary's security, by an external armed attack or the threat of an act of partly or entirely of military nature with an impact equivalent to an external armed attack, or by the need to prepare for the fulfilment of obligations arising from NATO or EU treaty obligations.[60]

Based on the wording, the state of national defence crisis is quite close to both the state of danger and the state of war as special legal order regimes. In the context of the former, the Fundamental Law's wording "*armed conflict, war situation or humanitarian catastrophe in a neighbouring country"* (pertaining to the state of danger) and the Defence Act's wording *"with a view to the effects in Hungary of a crisis in a neighbouring state requiring also military management and directly threatening Hungary's security"* (pertaining to the state of national defence crisis) pose a problem of legal interpretation. If we take the current war in Ukraine, it is rather difficult to decide whether that situation is rather an *"armed conflict […] in a neighbouring country"*, thus justifying the declaration of a special legal order (state of danger), or "*a crisis in a neighbouring state […] directly threatening Hungary's security"*, i.e. a state of national defence crisis within the meaning of the Defence Act as an ordinary law. It should be noted that a state of national defence crisis does not exclude having a state of danger as a special legal order,[61] thus, there is no legal obstacle to the Government maintaining a state of danger and a state of national defence crisis in parallel, given that in both cases the Government is both the declaring authority and the one entitled to take measures, with the Minister responsible for national defence being able to initiate a state of national defence crisis. In a state of national defence crisis, the Government may primarily take the measures provided for in the Defence and Security Coordination Act, in connection with which it is important to note that the Defence Act does not refer to specific provisions of the Defence and Security Coordination Act, but points to the possible actions under the Defence and Security Coordination Act in general.[62] The problem with this is that it allows for an expansive interpretation of the law, as described below (this is true even if the legislator did not necessarily intend to allow for an overly expansive interpretation). Firstly, since the introductory wording provides that in a crisis the Government may introduce additional measures as provided for by the Defence and Security Coordination Act (beyond the measures laid down in it), this may also mean that the Defence Act extends to the Government the scope of the provisions of the Defence and Security Coordination Act that otherwise would not apply to the Government. This is because the measures in question are not the ones the Government can otherwise take, but all of the measures in the Defence and Security Coordination Act in general. Secondly, on the basis of the above-mentioned provision of the Defence Act it is even possible to interpret the rules in such an expansive way that all the possible measures of the Government as contained in the Defence and Security Coordination Act can be applied in a state of national defence crisis, including the measures applicable in a special legal order as discussed above. It should be stressed in relation to the measures that can be introduced in a state of national defence crisis[63] that although these measures primarily serve

[59] Defence Act, Article 107.
[60] Defence Act, Article 107(2).
[61] According to Article 107 (3) of the Defence Act, a state of national defence crisis may not be ordered and a state of national defence crisis already ordered must be lifted if a state of war or a state of emergency has been declared.
[62] The introductory part of Article 107(4) of the Defence Act.
[63] In a state of national defence crisis, the Government may introduce measures such as increasing the readiness of the national defence organisation; increasing the activities of the Military National Security Services and the reconnaissance, counter-intelligence and cyberspace operation forces of the National Defence Forces in order to prevent the spread of the threat to Hungary or its intensification in Hungary; the mandatory publication of official statements by public broadcasters; the stockpiling of products, energy carriers and consumer goods important for national defence; the filling of positions and

military preparation, we must not forget the fact that the respective restrictions are imposed by the Government not during a special legal order, but in peacetime. Therefore, for example, the activities of the military national security services and the relevant forces of the Hungarian Defence Force aimed at preventing the spread or intensification of the threat (so it is not about these bodies preventing the spread of the crisis itself) may raise serious fundamental legal concerns. However, the Defence Act does not specify what (rights) restrictions may be introduced to this end, so we have a good reason to believe that it falls within the Government's own competence to decide on the concrete measures. Since we are not talking about a "crisis" within the framework of the special legal order, it cannot be emphasised enough that the special legal order rules allowing for the increased restriction on fundamental rights do not apply here. This means that the imposition of overtime in a simplified procedure for posts and jobs which are important for the functioning of the public administration, the defence administration, the defence forces or bodies involved in defence activities, radio spectrum restrictions, the application of alert levels which also affect citizens (i.e. the extension of special legal order rules to the ordinary legal order), or the exclusion or restriction of access to public institutions and places of public use are all restrictions, the constitutionality of which is highly debatable, given that the necessity for the restrictions is not clearly provided either. This is not, of course, the first instance when the special legal order (and the related restrictions) are incorporated into the ordinary legal order. We have seen and can see the same in the case of the state of migration emergency or the state of medical crisis.[64]

As for the connection with the state of war, what may primarily pose a problem in that regard is delimiting an *"external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger of either of them"* as included in Article 49(1)(b) of the Fundamental Law in the context of the state of war, and *"an external armed attack or the threat of an act of partly or entirely of military nature with an impact equivalent to an external armed attack"* as included in Article 107(2)(b) of the Defence Act in the context of the state of national defence crisis. The key question is what is the difference between *"an act with an impact equivalent to an external armed attack*" and "*an act of partly or entirely of military nature with an impact equivalent to an external armed attack"*. Unfortunately, both the Fundamental Law and the Defence Act fail to provide a precise definition, leaving it to the discretion of the Government to declare a state of war or a state of national defence crisis. Although a statutory definition of (imminent) danger and threat, which can often be used synonymously in the Hungarian language, would be helpful, the Defence Act does not make any

jobs important for the functioning of the public administration, the defence administration, the National Defence Forces and bodies involved in the defence through a simplified procedure and the carrying out of overtime work; the introduction of restrictive rules on the use of radio spectrum and the preparation of special modes of operation; the introduction of military air traffic control in Hungarian airspace and airports to the extent necessary; the application of alert levels which also affect citizens; and the coordinated action of trained forces of the National Defence Forces and the police to prevent or avert serious acts of violence by restricting or excluding access to certain public institutions and places of public use.

[64] For more details on this and the related concerns, see: Eötvös Károly Institue: *A veszélyhelyzet „soha nem érhet véget" [The State of Danger "Can Never End"],* 3 May 2021, http://www.ekint.org/alkotmanyossag/2021-05-03/a-veszelyhelyzet-soha-nem-erhet-veget-allaspont; Hungarian Helsinki Committee: *Száz napja vették el mindenki mindenféle gyülekezési jogát [The Right to Assembly Was Taken Away from Everyone Hundred Days Ago],* 19 February 2021, https://helsinki.hu/szaz-napja-vettek-el-mindenki-mindenfele-gyulekezesi-jogat/; Amnesty International Hungary – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *Never-Ending Story? Rapid analysis of the Bills T/10747 and T/10748,* 27 May 2020, https://helsinki.hu/wp-content/uploads/Never-Ending_Story_HHC-AI-HCLU_rapid_reaction_27052020.pdf; Hungarian Helsinki Committee: *Background Note on Act XII of 2020 on the Containment of the Coronavirus, 31 March* 2020, https://helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf; Mészáros, footnote 2; Mészáros, footnote 3; Mészáros, footnote 5; Mészáros, footnote 6; Mészáros, footnote 7; Mészáros, footnote 15. The new special legal order rules continue not to exclude the possibility of parallelly maintaining or ordering a state of crisis caused by mass immigration crisis or a state of medical crisis. In other words, the "special legal orders regimes" applicable in an ordinary legal order can continue to operate in parallel with the special legal orders under the Fundamental Law.

substantive distinction between the two.[65] This in itself gives the Government a degree of discretion which fundamentally violates the rule of law, and on top of that, it could reasonably be expected to be open to abuse.

A similar dilemma in the context of the state of war and the national defence crisis is the rule relating to the fulfilment of allied commitments, as both laws refer to this, but while the Defence Act refers to the preparation for the fulfilment of the obligation, the Fundamental Law refers to the actual fulfilment of the obligation. It should also be noted that in this comparison, the dilemma mentioned in relation to the state of danger does not arise, since Article 107(3) of the Defence Act as referred to earlier applies to the state of war and the state of national defence crisis, i.e. the ordering of one excludes the other, and the two regimes cannot operate in parallel.

4. Conclusions

Unexpected acts of violence or protracted crises are special situations that can pose challenge not only to the state and the society, but also to the ordinary legal order. They can often not be dealt with by ordinary legal means, or only with considerable delay, due to the institutional constraints and the restrictions meant by fundamental rights guaranteed by constitutions. In the case of exceptional situations, it is difficult to determine, on the one hand, whether it is sufficient to deal with the situation under the ordinary legal order, and, on the other hand, if not, from which exact point in time and for how long it is possible to apply the extraordinary restrictions of rights. The new rules of the Fundamental Law presuppose that the special legal order will end once the special situation has passed, but in this context, it is a question whether the Government, which is entitled to take measures in the special legal order, is willing to give up at all the possibility of having additional powers. This dilemma is significant even in states where the rule of law is well-functioning, which is the reason why one of the main functions of special legal orders (i.e. regulated, "dichotomous" states of exception), in addition to dealing with the special situation, is to provide guarantees for a return to the rule of law.

The Ninth Amendment to the Fundamental Law and the related statutory rules do not meet this requirement, and the Government has ultimately been granted a special legal order mandate that is ostensibly bound by constitutional restraints, but in practice is without any restrictions. As we have seen in connection with the provisions of the Defence and Security Coordination Act, in the absence of substantive control by the Parliament, the Government is also a forum for review of its own decisions in the area of the restriction of fundamental rights. Furthermore, if, for some reason, the Parliament were to thwart the Government by a two-thirds majority (which would also mean that the special legal order decrees would lose their force), the Government would still be left with a number of Fundamental Law and cardinal law options to maintain its rule by decree. However, the possibility of arbitrary government overreach, whereby the mere invocation of a special situation is sufficient to restrict rights, is likely to mean the irreversible erosion, that is, the end of constitutional democracy; and domestic special legal order rules are clearly characterised by a lack of "law".[66]

[65] For example, in the context of ensuring the Government's national defence preparedness, threats that infringe or endanger Hungary's sovereignty and which are realized by the possible combined use of military and non-military elements are included in the text of the Defence Act, from which it can be inferred that the two categories are not sharply separated. Cf.: Defence Act, Article 6(1)(j).

[66] Cf.: Giorgio Agamben: Az élet szerző nélküli műalkotás. A kivételes állapot, a káosz igazgatása és a magánszféra – Ulrich Railff beszélgetése Giorgio Agamben olasz filozófussal [Life is A Work of Art without an Author. The State of Exception, the Management of Chaos, and Privacy – Ulrich Railff's Conversation with Italian Philosopher Giorgio Agamben], *Fundamentum*, 2005/3, 65.